cause of an inviolable presumption that a court is powerless to assert a fiction. But the conclusion in the principal case is in full accord with the generally prevailing view."

Who Is a Farmer?—The main issue in Robertson *v.* Dwyer, 184 Federal Reporter, 880, is whether or not appellee is a farmer. Appellants filed a petition to have him adjudged a bankrupt, and he pleaded his exemption from the bankruptcy act because he was a farmer. The facts respecting his occupation are, namely: He was born and raised on a farm. He had acquired considerable farm land, having one farm of 160 acres in Illinois on which he dwelt. Here he raised corn and oats on 46 acres and grass for feeding purposes on the balance. His stock consumed a great deal more of grain than he was able to raise for them, so he was required to buy about 8,400 bushels a year. A very high proportion of cattle were purchased and raised on the farm. When his stock became fattened he would sell them to growers or ship them to Chicago. The question is: Was he engaged in the business of dealing in stock or in farming? If the former, he was within the bankruptcy act; if the latter, he was exempt. The Circuit Court of Appeals holds that "instead of being a 'dealer' appellee was something like a manufacturer who takes raw materials ('feeders') and converts them into finished product ('fat beef cattle')," and concludes that conducting a "stock farm," as well as conducting a "grain farm," is farming, so appellee was exempt.

MISCELLANY.

Mr. Justice Harlan's Dissenting Opinion in the American Tobacco Company Cases.—I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Company and its accessory and subsidiary corporations and companies, including the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the Anti-trust Act of 1890, and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details for the

suppression of the evils of the combination in question. But the case is sent back, with *directions* further to hear the parties, by evidence or otherwise, "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, *and* of *recreating* out of the elements *now* composing it, a new condition" which shall not be repugnant to law. The court, in its opinion, says of the present combination, that its illegal purposes are overwhelmingly established by many facts, among others, "by the ever-present manifestations which is exhibited of a *conscious wrong-doing* by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain others, and to monopolize and retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade." The court further says of this combination and monopoly: "The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exerition of the ordinary right to contract and to trade, but by methods devised to monopolize the trade, by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."

But it seems that the course I have suggested is not to be pursued. The case is to go back to the Circuit Court in order that out of the elements of the old combination a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us—as it undoubtedly does—warrants the characterization which the court has made of this monster combination, why cannot all necessary directions be now given as to the terms of the decree? In my judgment, there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such directions would not only end this litigation, but would

serve to protect the public against any more conscious wrong-doing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress.

I will not say what, in my opinion, should be the form of the decree, nor speculate as to what the details ought to be. It will be time enough to speak on that subject when we have the decree before us. I will, however, say now that in my opinion the decree below should be affirmed as to the Tobacco company and its accessory and subsidiary companies, and reversed on the cross appeal of the Government.

But my objections have also reference to those parts of the court's opinion reaffirming what is said recently in the Standard Oil case about the former decisions of this court touching the Anti-trust Act. We are again reminded, as we were in the Standard Oil case, of the necessity of applying the "rule of reason" in the construction of this act of Congress—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid every restraint of interstate trade, in whatever form, or to whatever extent, but the court has assumed to insert in the act, by construction merely, words which make Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the Standard Oil case, was in accordance with our previous decisions in the Trans-Missouri and Joint Traffic cases, 166 U. S. 190, 171 U. S. 505, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time in the Standard Oil case, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the Trans-Missouri and Joint Traffic cases, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not

say, what, as I think, it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for, it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation.* Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the Anti-trust Act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta,* pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the Standard Oil case. I will not repeat what is therein stated, but it may be well to cite an additional authority. In the Trade-Mark cases, 100 U. S. 82, the court was asked to sustain the constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said: "If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do." This language was cited with approval in Employer's Liability cases, 207 U. S. 463, 502. I refer to my dissenting opinion in the Standard Oil case as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.